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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DOUGLAS C. VAN SLYKE, Plaintiff and Appellant, v. UNEMPLOYMENT INSURANCE APPEALS BOARD, Defendant and Respondent.	B208243 (Los Angeles County Super. Ct. No. BS111238)

APPEAL from a judgment of the Superior Court of Los Angeles County. David P. Yaffe, Judge. Affirmed.

Orren & Orren, Tyna Thall Orren for Plaintiff and Appellant.

Edmund G. Brown, Jr., Attorney General, Douglas M. Press, Assistant Attorney General, Jennifer M. Kim and Eric Deon Bates, Deputy Attorneys General, for Defendant and Respondent.

Douglas C. Van Slyke applied for disability benefits seven months after being terminated from his job. His disability claim was denied, first by the Employment Development Department (EDD), then by an administrative law judge (ALJ). Van Slyke did not submit any medical evidence to the ALJ showing a *current* disability.

While on appeal to the California Unemployment Insurance Appeals Board (the Board), Van Slyke asked, unsuccessfully, to submit medical evidence supporting his disability claim. His appeal was denied. Van Slyke filed a petition for a writ of mandate challenging the Board's decision. His petition was denied. We affirm. Van Slyke neither demonstrated "excusable neglect" nor the exercise of "reasonable diligence" when he failed to produce his medical evidence at the administrative hearing.

FACTS

In August 2006, Van Slyke lost his job as a mortgage loan broker due to (in his words) "poor sales results." He attributes his poor job performance to "my inability to cope with the pain and limited mobility in my lower back and hips." Though Van Slyke searched for employment following his termination, he believes that "I am not healthy enough to hold a job in a responsible manner."

In March 2007, seven months after losing his job, Van Slyke filed a claim for disability insurance benefits with the EDD. Van Slyke submitted a certification from his chiropractor, Eric Mumbauer, who diagnosed Van Slyke as having muscle spasms and hip and buttock pain, which prevents Van Slyke from sitting for more than 15 to 30 minutes at a time. Dr. Mumbauer began treating Van Slyke in March 2007. He certified that Van Slyke became disabled on March 11, 2007, and could resume his customary work on May 11, 2007.

The EDD paid Van Slyke benefits from March 18 to April 10, 2007, at the rate of $635 per week. On April 11, 2007, Van Slyke was examined by an orthopedist in an independent medical examination. The orthopedist found Van Slyke is able to do his regular or customary work, without restriction, because his symptoms have continued for more than five years and his job is sedentary. The EDD denied further benefits to

Van Slyke, on the grounds that "Your recent independent medical examination indicates that you were able to perform your regular or customary work."

Van Slyke appealed the EDD's denial of further benefits. The issue on appeal was: "Is the claimant able to perform regular or customary work." The notice of hearing states, "Bring all documents and witnesses necessary to support your case. ***Evidence is rarely accepted after the hearing.***" (Original emphasis.)

A hearing was conducted before an ALJ on June 26, 2007. Van Slyke testified that his lower back pain interferes with his work, whether the work is in the trucking business (his former occupation) or in sales. He received three epidural injections in 2003, which resolved his pain for about a year. He is now being treated by Dr. Mumbauer, and is doing yoga and regular exercise. He would like to return to his orthopedist, but cannot afford the treatment in the absence of medical insurance. Van Slyke offered an evaluation of his condition by the Valley Spine Center, done in October 2004: this report observes that Van Slyke seems to benefit from physiotherapy, and states that Van Slyke "is to continue working his current work duties."

The ALJ rendered his decision on July 5, 2007. He wrote that Van Slyke has a long history of lower back pain, underwent epidural injections in 2003 to alleviate the pain, and currently sees a chiropractor because he cannot afford an orthopedic specialist. During the independent medical examination in April 2007, the orthopedist noted that Van Slyke suffers advanced disk degeneration; however, he opined that Van Slyke's job duties are sedentary, so he could resume his customary employment. The ALJ concluded that back pain alone is not disabling and, "[i]n the absence of medical opinions to the contrary, the findings of the independent medical examination must be accepted under the circumstances presented here." The ALJ affirmed the EDD's denial of benefits to Van Slyke.

Van Slyke appealed the ALJ's decision to the Board. While his appeal was pending, Van Slyke sent the Board a letter stating, "I would [like] to apply to submit more evidence from my doctors at the Valley Spine Center." He explained that he did not submit this evidence to the ALJ "[d]ue to my financial situation and the cost of a

current re-evaluation from the Valley Spine Center . . . I have no medical insurance." He appended a July 18, 2007, statement from a physician specializing in pain management at Valley Spine Center. The physician opined that Van Slyke was incapable of performing his regular work as the result of a lumbar disk protrusion, which he characterized as an occupational disease. While the physician indicated that Van Slyke would be able to resume his customary work on November 30, 2007, he did not indicate when the disability commenced.

The Board adopted the ALJ's decision as its own in a decision rendered on September 4, 2007. It noted that Van Slyke did not offer a statement from the pain management specialist until after he filed his appeal. The decision states that Van Slyke "has not established [that] this information could not have been presented at the hearing with the exercise of diligence. Parties have a due process right to review and rebut any evidence considered by the administrative law judge. That right cannot effectively be exercised if information is presented after the hearing." Thus, "We have not considered the new information in our deliberations because there is no explanation why the information could not have been submitted at the hearing and to do so would violate due process."

Van Slyke filed a petition for a writ of mandate. He argued that the state denied benefits based on his "inability to pay for additional orthopedic exams and diagnosis in order to combat the state[']s cursory orthopedic independent medical exam and diagnosis report." He maintained that the Board erred by refusing to allow new evidence supporting his claim for benefits. The Board answered that Van Slyke did not meet his burden of proving his inability to perform his usual and customary work, and should not be allowed to introduce new evidence that was not presented to the ALJ.

At the hearing on Van Slyke's petition, the trial court inquired why Van Slyke did not submit a doctor's report until after the ALJ rendered a decision. Van Slyke explained that the doctor initially wanted $620 to do the report, but later reduced the fee to $150 after Van Slyke pleaded financial hardship. The court said, "Mr. Van Slyke, the point here is . . . that you can't go out and get more evidence after some tribunal rules against

you and then claim that you're entitled to a new hearing because after you found out you lost, you now got some new evidence." The court noted that the only statement from Dr. Mumbauer contained in the administrative record certified that Van Slyke would be able to return to work on May 11, 2007. Hence, said the court, "the A.L.J. certainly didn't have any evidence from Dr. Mumbar [*sic*] you were disabled after May 11, 2007." Van Slyke replied that he was unaware of his duty to submit updated disability forms to the ALJ. The court found that the Board did not err by refusing to accept new medical evidence that was not considered by the ALJ. The court did not believe that Van Slyke was unable to obtain the report before the matter was heard by the ALJ.[1]

In its statement of decision, the court wrote that an independent review of the administrative record supports the administrative decision. Medical reports show that Van Slyke has a long history of back pain; however, none of those reports indicate that Van Slyke was disabled from performing his customary employment duties after May 11, 2007. There was no change in his back condition noted in the medical reports that would explain why he was now disabled, when previously he was able to work despite having pain. The court found the Board's refusal to accept new evidence from Van Slyke was not an abuse of discretion: Van Slyke cannot "nullify the effect of the administrative decision by offering additional evidence after the administrative hearing has been completed." The court denied Van Slyke's petition, and entered judgment in favor of the Board on March 25, 2008. This timely appeal ensued.

DISCUSSION

1. Review of Board Decisions

Appeal is taken from the judgment. (Code Civ. Proc., § 904.1, subd. (a)(1).)[2] On a petition for a writ of mandate, the trial court's inquiry extends to the issue of whether the administrative agency "has proceeded without, or in excess of jurisdiction; whether

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[1] Van Slyke indicated that he told the Board "I couldn't afford" a report. The court responded, "Well, they didn't believe you and I don't believe you, either."

[2] All further statutory references are to the Code of Civil Procedure.

there was a fair trial; and whether there was a prejudicial abuse of discretion. Abuse of discretion is established if [the agency] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (§ 1094.5, subd. (b).)

The trial court exercises its independent judgment when reviewing a decision of the Board. (*MacGregor v. Unemployment Ins. Appeals Bd.* (1984) 37 Cal.3d 205, 211-212.) The court "may make its own findings and conclusions based on the evidence before it." (*Id*. at p. 212.) The trial court's conclusions will be upheld on appeal if they are supported by substantial, credible and competent evidence. (*Ibid.*; *Lozano v. Unemployment Ins. Appeals Bd.* (1982) 130 Cal.App.3d 749, 754.)

2. Admission of New Evidence

Van Slyke contends that the Board and the trial court erred by refusing to consider new medical evidence supporting his disability claim. The evidence was created by Van Slyke's doctor, after the ALJ conducted a hearing and rejected Van Slyke's disability claim. The court did not believe Van Slyke's claim that he could not submit a report on his back problems to the ALJ, because of the cost.

"Public policy requires a litigant to produce all existing evidence on his behalf at the administrative hearing." (*Windigo Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586, 595.)[3] In reviewing an administrative decision, the trial court is confined to the evidentiary record presented at the administrative hearing, unless the petitioner "can show it possesses evidence not presented to the [agency] which it could not have produced in the exercise of reasonable diligence or unless relevant evidence was improperly excluded at the administrative hearing." (*State of California v. Superior Court* (1974) 12 Cal.3d 237, 257; *Sierra Club v. California Coastal Com.* (2005) 35 Cal.4th 839, 863; § 1094.5, subd. (e).)

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[3] The Code of Regulations provides that "A party appearing in a hearing shall have his or her evidence and witnesses and be ready to proceed." (Tit. 22, § 5062, subd. (a).)

The courts have interpreted the "reasonable diligence" requirement to "authorize the receipt of evidence of *events which took place after* the administrative hearing." (*Windigo Mills v. Unemployment Ins. Appeals Bd., supra,* 92 Cal.App.3d at pp. 596-597, italics added.) This Court wrote that there is "a narrow, discretionary window for additional evidence, newly discovered after the hearing (or improperly excluded at it)." (*Fort Mojave Indian Tribe v. Department of Health Services* (1995) 38 Cal.App.4th 1574, 1595.) We warned that "routine allowance" of reports created *after* an administrative decision poses "a threat of repeated rounds of litigation, and uncertain, attenuated finality . . . ." (*Ibid.*)

The relevant "event" in this case is Van Slyke's claim of back pain, which existed before the administrative hearing. The belated medical report is simply evidence supporting the existing claim. The report itself is not a new "event." Rather, it is evidence that could have been obtained before the hearing, but instead was created as a response to--and an attempt to relitigate--an adverse administrative decision.

The Board is not required to accept new or additional evidence. It may, in its discretion, approve an application to present new or additional evidence after considering "the reasons why such evidence was not introduced at the hearing before the administrative law judge." (Cal. Code Regs., tit. 22, § 5102, subd. (b).) "No such evidence shall be considered by the board unless the board admits it." (*Ibid.*)

Van Slyke argues that he had "good cause" for his dilatoriness, as a result of surprise or excusable neglect. (Cal. Code Regs., tit. 22, § 5000, subd. (hh) [defining "good cause" as "a substantial reason under the circumstances, considering the diligence of the proponent," and taking into account "mistake, surprise, inadvertence, or excusable neglect"].) Relief from mistake, surprise, inadvertence or neglect is not granted unless the error is *excusable*. The courts inquire whether a reasonably prudent person under the same or similar circumstances might have made the same error. In other words, these are mistakes anyone could have made. (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 258; *Solv-All v. Superior Court* (2005) 131 Cal.App.4th 1003, 1007.)

In this instance, Van Slyke was warned, in writing, to "[b]ring all documents . . . necessary to support your case" to the hearing before the ALJ, because "evidence is rarely accepted after the hearing." Despite having this advance warning, Van Slyke did not bring any medical documentation showing a current disability to the hearing. Instead, he gave the ALJ a report from October 4, 2004, which, the ALJ noted, "is an old report." In addition, the ALJ had a certification from Dr. Mumbauer stating that Van Slyke had a disability that began on March 11, 2007, and ended May 11, 2007. It was not until *after* the ALJ denied benefits that Van Slyke asked his pain management physician to produce a new report at a reduced fee.

Appellant has the burden of proving that the administrative proceedings "'were unfair, in excess of jurisdiction, or showed "prejudicial abuse of discretion."'" (*Alford v. Pierno* (1972) 27 Cal.App.3d 682, 691.) Van Slyke has not carried his burden of showing a prejudicial abuse of discretion arising from the Board's refusal to consider his belated medical evidence, because he has not shown that his evidence could not have been produced at the hearing in front of the ALJ "in the exercise of reasonable diligence." (§ 1094.5, subd. (e).) Van Slyke gambled that his testimony would carry the day, despite a recent independent medical examination report finding that he was not disabled. Van Slyke claims that he could not afford a medical report from his pain management specialist, yet he managed to secure such a report after the ALJ rendered his decision. Nothing in Van Slyke's financial condition changed during those weeks; only his motivation changed because he had lost his administrative appeal. While this may qualify as mistake, inadvertence, surprise or neglect, it was not "excusable." Absent a showing that the medical report could not have been produced with the exercise of reasonable diligence, the trial court did not abuse its discretion by refusing to consider evidence outside the administrative record. (*Armondo v. Department of Motor Vehicles* (1993) 15 Cal.App.4th 1174, 1180.)

3. <u>Sufficiency of the Evidence</u>

The trial court's findings and conclusions are supported by substantial evidence. The administrative record contains an independent medical examination showing that

Van Slyke is able to do his regular or customary work, without restriction. The administrative record also contains a 2004 report from Valley Spine Center stating that Van Slyke may "continue working his current work duties." Finally, the record contains a certification from Dr. Mumbauer stating that Van Slyke could resume his customary work by May 11, 2007.

Given this medical documentation, the determination that Van Slyke is not disabled is supported by the record. In addition, the record shows that Van Slyke made no claim that his pain was disabling until seven months after he was terminated from his job. There is no evidence of a significant change in Van Slyke's condition that rendered him unable to continue working. As a result, the petition for a writ of mandate was properly denied.

Van Slyke complains that the March 2007 report from his chiropractor was improperly ignored, discarded or treated as a nullity because Dr. Mumbauer is not a medical doctor. This contention is not borne out by the record. During the administrative hearing, the ALJ asked if Van Slyke had "a recent report" from Dr. Mumbauer, to which Van Slyke replied, "I figured you guys had his last report." The problem is not that the ALJ was biased or prejudiced because Dr. Mumbauer is a chiropractor. Rather, the problem is that Dr. Mumbauer's report clearly states that Van Slyke could resume his customary work by May 11, 2007. Even when given full credit, Dr. Mumbauer's report did not support a finding that Van Slyke was disabled at the time of the hearing before the ALJ on June 26, 2007.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.